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In the
Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,
v.
NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Writ of *Certiorari* to the
United States Court of Appeals
for the First Circuit

BRIEF OF *AMICI CURIÆ* ASSOCIATED INDUSTRIES OF MASSACHUSETTS, CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION, AND THE RETAILERS ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF RESPONDENT AND FOR AFFIRMANCE

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INTEREST OF *AMICI CURIÆ*[1]

Associated Industries of Massachusetts ("AIM") is a Massachusetts corporation with its principal place of business at 222 Berkeley Street, Boston, Massachusetts. AIM is a non-profit, business organization with approximately 5000 members, all of which do business in the Commonwealth of Massachusetts. The Retailers Association of Massachusetts ("RAM") is a Massachusetts corporation with its principal place of business at 18 Tremont Street, Boston, Massachusetts. RAM is a non-profit Massachusetts business association with approximately 1700 members, comprised of retail companies of all types and sizes which do business in the Commonwealth of Massachusetts. The Connecticut Business and Industry Association ("CBIA") is an association of Connecticut businesses with approximately 10,000 member companies throughout the state. CBIA offers its members a wide array of resources and services related to the legal, economic, and social aspects of running a business, and it presents the views of its members on public policy and legal issues to regulatory, legislative and judicial authorities. AIM and CBIA have frequently participated as *amicus curiæ* in cases raising issues of importance to the business community.

While AIM, RAM, and CBIA, like the Commonwealth of Massachusetts, are concerned about the human rights violations committed in Myanmar, they do not believe that each of the fifty states and the thousands of American cities and towns may, by boycotting companies that do business in countries they currently disfavor, engage in foreign policy initiatives to attempt to effect change in those countries.

Amici are particularly concerned because of the importance of exports to the economic health of New England and the prosperity of New England businesses. The Burma Law and others like it put New England businesses in the position of being unreliable suppliers in the highly competitive international marketplace. While today it is the governing regime in Myanmar that has piqued local anger, tomorrow it could be Canada, the Commonwealth's largest trading partner, in a dispute over international fishing rights. Such a dispute would have even more dire consequences for New England businesses.

Pursuant to Supreme Court Rule 37.2, counsel for *amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

SUMMARY OF ARGUMENT

The legislative history of the sanctions that the Commonwealth of Massachusetts imposed on companies doing business in Myanmar demonstrates beyond dispute that it was a foreign policy initiative to effect change in and restore democracy to Myanmar. The legislators who debated and passed the bill and the Governor who signed it all recognized it to be foreign policy.

The Burma Law serves no legitimate local purpose. The Commonwealth's argument that it does because it serves to disassociate the Commonwealth and its tax dollars from Myanmar should be rejected. The Commonwealth has no

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

association with Myanmar which must be severed to distance itself further from the denial of human rights by the governing regime there. The Burma Law, instead, disassociates the Commonwealth from companies that do any business in Myanmar for the sole purpose of fostering its foreign policy goals.

The attempt made by certain of the Commonwealth's *amici* to create another local interest also fails. Invalidating the Burma Law will not undermine state sovereignty or interfere with local control over the allocation of scarce resources.

Even if it serves a legitimate local interest, the Burma Law is nonetheless invalid because its has serious foreign resonances and has had a high degree of success in driving businesses out of the markets in Myanmar.

Assuming the market participant doctrine applies to foreign commerce, which it does not, the Burma Law is not the act of a market participant under that doctrine as developed by this Court. Prohibiting the Commonwealth's vendors, their subsidiaries and affiliated companies from selling their goods and services in Myanmar is market regulation not market participation. The fact that the Burma Law increases the cost of certain goods and services underscores the conclusion that it is not the act of a market participant.

ARGUMENT

Respondent National Foreign Trade Council ("NFTC") demonstrates in its Brief that the United States Court of Appeals for the First Circuit correctly ruled that the Massachusetts Burma Law, Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M, is unconstitutional because it impermissibly intrudes on the federal government's exclusive foreign affairs powers.

NFTC also demonstrates that the First Circuit correctly held that the Burma Law violates the Foreign Commerce Clause of the United States Constitution and is, in any event, preempted. *Amici* will not repeat those arguments here. *Amici* will address two issues: the lack of any legitimate local interest advanced by the Burma Law and the Commonwealth's contention that it acts as a "market participant" when it engages in foreign policy, thereby immunizing its conduct from scrutiny. *Amici* contend that the economic irrationality of the Massachusetts Burma Law, which *increases* the costs for goods and services purchased by the Commonwealth, demonstrates that the Commonwealth is not acting as a market participant but as a market regulator.

I. THE BURMA LAW, ENACTED TO CONDEMN THE GOVERNING REGIME IN MYANMAR AND TO HELP TO RESTORE DEMOCRACY THERE, IS A FOREIGN POLICY INITIATIVE WHICH HAS NO LEGITIMATE LOCAL PURPOSE.

The Legislative history of the Massachusetts Burma Law demonstrates beyond dispute that it is a foreign policy initiative of the Commonwealth with the "identifiable goal" to have "free democratic elections in Burma." National Foreign Trade Council v. Natsios, 183 F.3d 38, 46 (1st Cir. 1999). Representative Byron Rushing, the sponsor of the bill which became law, explained its purpose to his colleagues in the House:

> I want to . . . make . . . very clear what this legislation does. . . . [I]t establishes a program that is called selective purchase in regard to the country of Burma. It does that for a simple reason. We, in this legislature, have the proud

> reputation of being one of the leaders in this country and in this world . . . in the movement to restore democracy in South Africa, and we learned in that process two things. One is, that if you're going to engage in foreign policy, you have to be very specific.

Joint Appendix ("Jt. App.") at 38-39. Representative Teague who sought to expand the bill to include China candidly described precisely what the House thought it was doing:

> [F]rom time to time over the years [the] Massachusetts General Court . . . has decided to engage in their own little version of foreign policy by restricting investments, primarily from our state pension funds and prohibiting pensions [from being invested] in policies we find offensive.

Jt. App. at 35.

Members of the Senate also recognized that the bill was a foreign policy initiative. Senator Walsh, a supporter of the bill, noted that

> the Federal Government gets many of its best ideas from the Commonwealth of Massachusetts . . . so we look forward to future debate on how we can advance civil and human rights in the country of Burma by our business dealings with the Commonwealth of Massachusetts.

Jt. App. at 47. Other senators questioned why the legislature was attempting to engage in foreign policy.

> If it is such a great idea then maybe [Senator Walsh] could ask the president of the United States to put it in his foreign policy guidelines and business guidelines.

Jt. App. at 47. Senator Hicks also urged the Senate not to "dabble in foreign affairs." Jt. App. at 50.

In the news release announcing that then-Governor Weld had signed the legislation, he stated:

> One law passed by one state will not end the suffering and oppression of the people of Burma, but it is my hope that other states and the Congress will follow our example, and make a stand for the cause of freedom and democracy around the world.

Jt. App. at 57. Thus, all involved in the enactment of the Burma Law understood and acknowledged that they were setting foreign policy.

While the Commonwealth admits this, as it must, it also contends that the Burma Law was "intended to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma," Petitioners' Brief ("Pet. Br.") at 31, which the Commonwealth asserts is a "valid local purpose." Jt. App. at 32. The Commonwealth's *amici* repeat this theme. See Brief of the Council of State Governments et al. at 24 (selective purchasing laws have the "goal of refraining from supporting morally offensive practices"); Brief of New York City Comptroller et al. at 7 ("the state has an independent institutional interest, apart from the substance of its social goals, in spending public money in a way that reflects the views

of its citizens"). Upon the most cursory analysis, this purported local concern turns out to be simply rhetoric.

The Commonwealth has no relationship with Myanmar from which it must disassociate itself to protect the moral values of its citizens. Indeed, the Burma Law "disassociates" the Commonwealth not from Myanmar, with which it never "associated," but from sellers of paper clips, pencils, cement, steel, computers, and telephones that sell any of their products to buyers in Myanmar, or have a subsidiary or affiliated company that does business there. The Commonwealth disassociates from these sellers to effectuate its foreign policy goals, not to advance any legitimate local purpose.

The Commonwealth's *amici* seek to advance another purported local purpose when they argue that State sovereignty will be undermined and dire consequences will ensue if selective purchasing laws are not upheld. Relying on this Court's recent decision in Alden v. Maine, 119 S. Ct. 2240, 2264-65 (1999), they contend:

> Among the sovereign prerogatives reserved to the states and to the municipalities within their borders . . . is control over their own proprietary activities, including spending. . . . Without control over their own budget and business affairs, states and localities would lack autonomy and financial independence, and would ultimately lose control over "the course of their public policy and the administration of their public affairs."

Brief of the New York City Comptroller et al. at 8 (citations and footnote omitted). This hyperbole is misdirected and provides

no basis for sustaining the Burma Law.

Invalidating the Burma Law would not undermine a state's control over its budget which will continue to be set by the legislature. Nor would any state's financial independence be compromised -- states would remain free to allocate their tax dollars to procuring those goods and services they determined they needed. Unlike the immunity from suits for damages at issue in Alden, invalidating the Burma law does not in any way affect the "the allocation of scarce resources among competing needs and interests." Alden, 119 S. Ct. at 2264. States would retain their authority to prioritize their needs and decide how best to serve them. No federal intrusion into "the distinct responsibilities of the State," id. at 2265, would result from holding the Burma Law invalid.

Even if this Court concludes that the Burma Law promotes a legitimate local purpose, it is nonetheless invalid. While state laws furthering legitimate local interests which have "merely foreign resonances" may be upheld, Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 194 (1983), the effect of the Burma Law is more than a mere "resonance." The parties stipulated that the Commonwealth purchases some "$2 billion of supplies and services" each year which are covered by the Burma Law. Jt. App. at 225, ¶ 45. The parties also stipulated that "[f]oreign trade with the Union of Myanmar generates nearly $2.3 billion in revenues each year." Id., ¶ 46. Companies that do business with the Commonwealth had to choose between doing business with the Commonwealth and doing business in Myanmar. Natsios, 181 F.3d at 46. The Commonwealth's foreign policy has had its intended effect on companies doing business in Burma. Representative Rushing was quoted as saying, when he was informed that Apple Computer was discontinuing business in Myanmar: "This is

exactly what we want this law to do . . . . We hope the rest of the companies also get out." Frank Phillips, *Apple Cites Mass. Law in Burma Decision,* Boston Globe, Oct. 4, 1996, at B6, cited in D. Schmahmann & J. Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 Vanderbilt J. Transnational L. 175, 196 n.100 (1997). Not only did Apple Computer discontinue doing business in Myanmar, at least twelve other businesses did as well. Jt. App. at 101.

Casting the Burma Law as a means of disassociating itself and its tax dollars "from the denial of human rights in Burma," does not transform otherwise impermissible conduct into a legitimate local interest. If, as the First Circuit held and the NTFC demonstrates in its Brief, state and local governments have no role to play in the conduct of foreign affairs, statutes, ordinances and regulations — which have as their purpose "making a statement" about foreign affairs and foreign governments (or "disassociating" from them) — serve no legitimate local purpose, and have "great potential for disruption or embarrassment" of United States foreign policy. Zschernig v. Miller, 389 U.S. 429, 434-435 (1968).[2] These selective purchasing laws, including the Burma Law, cannot stand.

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2. See also Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill.2d 221, 104 Ill. Dec. 743, 503 N.E.2d 300, 307 (1986) ("Even though such disapproval may be justified, it nonetheless creates a risk of conflict between nations, and possible retaliatory measures. No single State should put the nation as a whole to such a risk.").

II. THE COMMONWEALTH'S FORAY INTO FOREIGN AFFAIRS IS NOT IMMUNIZED FROM SCRUTINY BY THE MARKET PARTICIPATION DOCTRINE.[3]

The Commonwealth contends that the Burma Law "is constitutional because it represents market participation, not regulation," and is therefore not subject to review under the foreign affairs or foreign commerce powers. Pet. Br. at 25. The Commonwealth reasons that its conduct is "market participation" because the Burma Law "governs only the procurement of goods and services by the State — and thus a market created solely by State purchasing." Pet. Br. at 31.[4]

This Court, however, has rejected the argument that all state procurement conditions are "market participation." Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 229 (1993). See also South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 95- 96 (1984) (plurality) ("[a]lthough the Court in Reeves did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not — and did

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3. This argument assumes that the market participant doctrine applies to foreign commerce. The First Circuit correctly held, however, that it does not. Natsios, 181 F.3d at 59-60.

4. In making this "market creation" argument, the Commonwealth appears to be confusing its dollars with existing markets. The paper clip and computer terminal markets exist whether or not the Commonwealth makes purchases in them. Contrary to the Commonwealth's claim, it cannot be said that these markets were created "solely by State purchasing."

not purport to — sanction the imposition of any terms that the State might desire . . .); Reeves, Inc. v. Stake, 447 U.S. 429, 438 n. 12 (1980) (recognizing that "[w]hen a State buys or sells, it has the attributes of both a political entity and a private business"); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 211 n.7 (1983) (recognizing that there are limits to burdens state may impose on its spending decisions); Heim v. McCall, 239 U.S. 175, 192 (1915) (characterizing the imposition of conditions governing the hiring of workers for public construction projects as "regulation"). Accordingly, the question is whether the conditions on state procurement created by the Burma Law are market participation or market regulation.

The Commonwealth does not act as a market participant when it disqualifies companies from receiving state contracts because those companies do business in Myanmar. As this Court noted in Camps Newfound/Owatonna, Inc. v. Harrision, 520 U.S. 564, 592-93 (1997), the three early cases[5] in which the market participation doctrine was used to uphold state statutes that discriminated against out-of-state entities, "stand for the proposition that, for purposes of analysis under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.'" See also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2230

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5. As recounted in NFTC's Brief, the first case in which the market participation doctrine emerged was Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976). The doctrine also justified the conduct at issue in Reeves and White. In each of these cases, state or local government acted to advance the local economic or environmental, not moral or political, interests of its citizens.

(1999) ("where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator"). The Burma Law, of course, does not favor Massachusetts citizens or companies[6] over others, and is, therefore, not protected from invalidity by the reasoning of the early cases applying the market participation doctrine.

In striking the condition that Alaska imposed on the sale of its timber, the plurality in South-Central Timber set forth other factors to be considered to determine whether a state acts as a market participant when it imposes conditions on those with whom it deals:

> In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.

467 U.S. at 96. The plurality continued:

> The limit of the market-participant doctrine

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6. The Burma Law may indeed hurt Massachusetts companies who might be expected to seek contracts with the Commonwealth more frequently than out-of-state or foreign companies.

> must be that it allows a State to impose burdens on commerce *within the market in which it is a participant*, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

Id. at 97-98 (emphasis added). Under this analysis, the Burma Law cannot be considered market participation.

The Burma Law places restrictions on the private action of companies in the conduct of their businesses in connection with other contracts to sell goods and services in which the Commonwealth plays no role whatsoever. "The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private relations. When exercised by government, such a power is the essence of regulation." White, 460 U.S. at 219 (Blackmun, J., dissenting) (emphasis in original; footnote omitted). Accord South-Central Timber, 467 U.S. at 95-96 (plurality). The Commonwealth dictates with whom its vendors may deal — "the essence of regulation." In addition, the Burma Law targets a market in which the Commonwealth does not participate — Myanmar — and seeks to drive private companies from those markets by requiring those with which it may contract to stop doing business there.

The Commonwealth contends that it is a market participant under this Court's analysis in White. The Commonwealth's reliance on White is, however, misplaced. Indeed, the Commonwealth turns the holding and reasoning of White on its head when it argues that:

> given that White accepted an upstream restriction on whom private contractors can hire . . . , a selective purchasing law could not possibly be invalid simply because it might affect secondary upstream markets. . . . Like the restriction in White, the Burma Law imposes a narrow condition precedent on companies who are competing for state contracts and thus "cover[s] a discrete, identifiable class of economic activity in which the State is a major participant."

Pet. Br. at 34. The restriction upheld in White, that contractors working on construction projects funded by the City of Boston hire at least 50% Boston residents, is not similar or parallel to the restriction imposed by the Burma Law. The condition imposed in White did not go beyond the actual transaction between the parties. The contractors in White were not required to hire at least 50% Boston residents on all their other construction projects undertaken within the city, the nation or the world, the corollary to the restriction imposed by the Burma Law, as the First Circuit recognized. Natsios, 183 F.3d at 63. Moreover, the restriction in White promoted a legitimate local interest of the City in seeking employment for its residents — what this Court characterized as "parochial favoritism." White, 460 U.S. at 213. No such legitimate local interest is advanced by the Burma Law.

While the White Court recognized that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," the Court did not need to define those limits because "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" Id. at 211 n.7. This connection was "'crucial' to the market participant analysis in White." South-Central Timber, 467 U.S. at 95. The Burma Law, in contrast, affects many parties who are not "working for" or with the Commonwealth. Instead, it disqualifies businesses from "working for" the Commonwealth and requires businesses that bid to "work for" it to curtail working in another market.

Moreover, the economic result of the Burma Law demonstrates that it is not an exercise of a market participant's legitimate discretion. The Commonwealth's *amici* Council of State Governments et al. candidly detail how the Burma Law actually harms the Commonwealth's treasury and Massachusetts citizens:

> If Massachusetts rejects a low bid from a company with Burmese connections due to Burma Law procurement restrictions, Massachusetts taxpayers suffer because they must pay more for the goods or services at issue; Massachusetts beneficiaries of public projects suffer because the projects are more likely to be eliminated or scaled down due to higher costs; and Massachusetts businesses suffer because they, like out-of-state businesses, must choose between doing business with Burma and doing business with the Commonwealth of

Massachusetts.

Brief of Council of State Governments et al. at 11. The net result of the Burma Law is to increase the costs of some goods and services the Commonwealth purchases, an increase the Commonwealth can be expected to pass on to its taxpayers in the form of tax increases.

"When the policy the law promotes is not efficient use of state funds," Gould, Inc. v. Wisconsin Department of Industry, Labor & Human Relations, 750 F.2d 608, 614 (7th Cir. 1984), aff'd sub. nom., Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986), the policy is not one of a market participant. "[B]y flatly prohibiting state purchases from repeat labor law violators [or from companies who transact business in Myanmar] Wisconsin 'simply is not functioning as a private purchaser of services, . . . for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 289 (1986). This Court should reach the same conclusion here based on the same conduct — disqualification from participating in the markets for the goods and services that the Commonwealth procures.

While the line between regulation and legitimate proprietary action may sometimes be difficult to discern, this Court has held that "policy setting" is a hallmark of regulation:

> When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as a regulator of

> private conduct, the State is more powerful than private parties. *These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.*

Building & Construction Trades Council, 507 U.S. at 229 (emphasis added). There can be no doubt that the Burma Law is an exercise of "policy setting." It implements the Commonwealth's claimed moral and political policy in favor of human rights and its policy of disassociating itself from human rights violations by regulating the conduct of its prospective business partners, "conduct unrelated to the [prospective business partner's] performance of contractual obligations to the State." Id. The Burma Law regulates a number of markets and the conduct of businesses with which it does not contract. It is not the act of a market participant.

The proliferation of selective purchasing laws by state and local governments heralded by the *amici* supporting the Commonwealth's position hurts American business. In Massachusetts alone, exports exceeded $17 billion dollars in 1997.[7] Selective purchasing laws seek to foreclose markets in which businesses would otherwise be able to compete and, hopefully, prosper. While today's focus is Myanmar, if these local foreign policy initiatives are upheld, the Massachusetts Legislature could target Canada tomorrow if adequately outraged. Such a law would curtail exports to the largest

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7. Statistics compiled by the Massachusetts Institute for Social and Economic Research at the University of Massachusetts at Amherst and cited in Alliance for Massachusetts, *Export Index* (Spring 1998) .

trading partner of Massachusetts companies.[8]

In addition, selective purchasing laws have added, and, if the Burma Law is sustained, will continue to add, layers of complexity to conducting business around the globe because companies will have to consider not only federal regulations and controls but myriad, and differing, state and local laws as well. See D. Schmahmann & J. Finch, *supra,* 30 Vanderbilt J. Transnational L. at 206-207. As a matter of economic policy, as well as Constitutional law, these state and local selective purchasing laws have no legitimate place.

CONCLUSION

For the foregoing reasons, and those set forth in the Brief of Appellee National Foreign Trade Council, this Court should affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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